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Supreme Court, U.S.
FILED
JAN 21 1999
CLERK

No. 97-1754

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

JUAN ANIBAL AGUIRRE-AGUIRRE,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS

This *amicus curiae* brief is submitted by the Office of the United Nations High Commissioner for Refugees with the consent of the parties.[1]

The Office of the United Nations High Commissioner for Refugees (UNHCR) has been charged by the United Nations General Assembly with responsibility for providing international protection to refugees and other persons within its mandate and for seeking durable solutions to the problems of refugees by assisting governments and private organizations. *See* Statute of UNHCR, U.N. Doc. A/RES/428(V), Annex, ¶¶ 1, 6 (1950). As set forth in its enabling statute, UNHCR fulfills its protection mandate by, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto." *Id.* ¶ 8(a). UNHCR's supervisory responsibility was formally recognized in the Protocol relating to the Status of Refugees, art. 2, 19 U.S.T. 6223 (1967) ("Protocol"), which the United States ratified in 1968.

The views of UNHCR are informed by almost 50 years of experience supervising the Protocol and the Convention relating to the Status of Refugees, 19 U.S.T. 6259 (1951) ("Convention"). UNHCR is represented in 118 countries. UNHCR provides guidance in connection with the establishment and implementation of national procedures for refugee status determinations, and also conducts such determinations under its mandate. UNHCR's interpretation of the provisions of the Convention and Protocol are, therefore, integral to the global regime for the protection of refugees.

The present case concerns the interpretation of the "serious non-political crime" exclusion contained in Article 1F(b) of the Convention and incorporated by reference into the Protocol. The

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[1] Pursuant to Rule 37(6) of the Rules of the Supreme Court, *amicus curiae* states that no counsel for a party has authored any part of this brief, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief.

exclusion clauses in Article 1F form part of the refugee definition and help to maintain the integrity of the institution of asylum by ensuring that the protective principles of the Convention are not exploited by persons who, by reason of their having committed particularly grave acts, are undeserving of international protection. At the same time, UNHCR has a strong interest in ensuring that those clauses are applied in a manner that comports with the humanitarian purposes of the international refugee protection regime.

Resolution of this case is likely to affect not only the interpretation by the United States of the provisions of the Convention relating to who is and who is not entitled to the internationally protected status of refugee, but also the manner in which other countries interpret those provisions. UNHCR, therefore, has a direct interest in ensuring that this Court's ruling is consistent with its own interpretation of the Convention.[2]

SUMMARY OF ARGUMENT

When enacting the Refugee Act of 1980, Congress made clear its intention to bring U.S. refugee law into conformity with the provisions of the Protocol and its understanding that the exclusions in that Act would be construed consistent with the Protocol. The core purpose of both the Refugee Act and the Protocol was to safeguard the rights of persons subject to persecution in their homelands. In view of this humanitarian purpose and the serious consequences of exclusion for the person concerned, Article 1F must be restrictively construed.

The specific purpose of Article 1F(b) was to distinguish persons regarded as *bona fide* refugees deserving of international protection from serious common criminals unworthy of such protection. In order to make this distinction, it is essential that the totality of circumstances surrounding an applicant's case be evaluated in determining whether the crime of which he is

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2 Consistent with its usual practice UNHCR submits this *amicus curiae* brief in order to explain the analytic framework for resolving issues of inclusion and exclusion under the Convention and not to offer an opinion on the merits of the applicant's claim.

suspected is "serious" within the meaning of Article 1F(b). This evaluation requires consideration of the nature of the offense, the punishment that may be imposed, and any mitigating or aggravating circumstances. A balance must be struck between the offense and the likelihood and severity of the persecution feared. An applicant is excludable only when such a balancing supports the conclusion that he is, in reality, a fugitive from justice or that his criminal character outweighs his character as a *bona fide* refugee.

Because Article 1F(b) creates an absolute bar, construing that article in a manner that prevents consideration of the totality of circumstances would deny States the right to recognize the status of persons they believe to be refugees deserving of international protection. Such a construction is inconsistent with the humanitarian purposes of the Convention.

In order for a crime to be classified as "political" for purposes of Article 1F(b), it must: (1) have a genuine political motive; (2) be causally related to its political objective; and (3) not involve means that are out of proportion to its political objective or are otherwise atrocious in nature. Determining whether an offense that is not atrocious in nature is proportionate to its political objectives requires consideration of the context and the totality of the surrounding circumstances.

ARGUMENT

I. THE HUMANITARIAN PURPOSES OF BOTH THE REFUGEE ACT AND THE PROTOCOL DICTATE THAT THE SERIOUS NON-POLITICAL CRIME EXCLUSION BE CONSTRUED RESTRICTIVELY.

When enacting the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) ("Refugee Act"), Congress made explicit its intention to "bring United States law into conformity with the internationally-accepted definition of the term 'refugee' set forth in the . . . Convention and Protocol." H.R. Rep. No. 96-608, at 9 (1979). Looking to "the new definition of 'refugee,' and indeed the entire 1980 Act," this Court recognized in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), that "[i]f one thing is clear from the legislative history . . . it is that one of Congress' primary purposes

was to bring United States refugee law into conformance with the . . . Protocol." *Id.* at 436-37; *accord Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 169 (1993).

As with the definition of "refugee" itself, Congress specifically expressed its intention that the provision of the Refugee Act obligating the Attorney General to withhold deportation of a refugee, 8 U.S.C. § 1253(h) (1994) [presently codified at 8 U.S.C. § 1231(b)(3) (1998)], "conform[ ] to the language of Article 33" of the Convention, *INS v. Stevic*, 467 U.S. 407, 421 (1984), including each of the exceptions to that withholding obligation. *See* 8 U.S.C. § 1253(h)(2)(A)-(D) (1994). Indeed, the conferees included these exceptions in the Refugee Act based on their explicit "understanding that [they were] based directly upon the language of the Protocol"[3] and would be "construed consistent with the Protocol." H.R. Conf. Rep. No. 96-781, at 20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 160, 161; *see McMullen v. INS*, 788 F.2d 591, 594 (9th Cir. 1986).[4] In view of this unambiguous expression of congressional intent, the Board of Immigration Appeals ("BIA" or "Board")—however broad its discretion might otherwise be—is obligated to construe the serious non-political crime exclusion in a manner consistent with the Protocol. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

As is the case with any treaty provision, construction of the serious non-political crime exclusion in the Convention must begin with the text. *See Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 65 (1993). "As treaties are contracts between independent nations, their words are to be taken in their ordinary meaning 'as understood in the public law of nations.'" *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931).

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3 The serious non-political crime exception tracks the language of the Protocol verbatim. *Compare* Immigration and Nationality Act ("INA"), 8 U.S.C. § 1253(h)(2)(C) (1994), *with* Convention, art. 1F(b).

4 This would be the case even in the absence of express congressional intent, since a statute "ought never be construed to violate the law of nations, if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *accord Weinberger v. Rossi*, 456 U.S. 25, 32 (1982).

While it is clear that a crime must be both "serious" and "non-political" to fall within the scope of Article 1F(b), nowhere does the Convention define the terms "serious crime" or "non-political crime." Nor do either of these terms, when read in isolation, have any accepted meaning in ordinary usage or uniform understanding in the law of nations. The term "serious" is context-dependent and, as Petitioner acknowledges (at 20-21), inherently ambiguous. The same can be said about the term "political crime," though this concept is familiar to the international community from the law of extradition. (*See infra* Point IV.)

As the intent of the parties cannot be determined from the text itself, it is necessary to turn to principles of treaty interpretation to ascertain Article 1F(b)'s meaning. The most basic such principle dictates that the phrase "serious non-political crime" be "read in the light of the conditions and circumstances existing at the time" the Convention was entered into and construed "with a view to effecting the objects and purposes of the States thereby contracting." *Rocca v. Thompson*, 223 U.S. 317, 331-32 (1912); *accord* Vienna Convention on the Law of Treaties, art. 31(1), 1155 U.N.T.S. 331 (1969) ("Vienna Convention"). Recognizing the importance of keeping faith with the purposes that animate international agreements, this Court has counseled that they "be construed in a broad and liberal spirit" and that "when two constructions are possible, one restrictive of rights that may be claimed under [them] and the other favorable to [those rights], the latter is to be preferred." *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924); *accord United States v. Stuart*, 489 U.S. 353, 368 (1989).

The core purpose of the Convention and Protocol was to safeguard the rights of vulnerable individuals who, by virtue of the grave consequences that might await them in their homelands, are in need and deserving of international protection. This purpose is reflected in the Preamble to the Convention in which the contracting parties profess their "profound concern for refugees" and endeavor to "assure refugees the widest possible exercise" of their "fundamental rights and freedoms." The Convention was adopted for the explicit purpose of extending "the scope of and the protection accorded by" previous international agreements relating

to the status of refugees. *Id.* at *pmbl.* The humanitarian goals of the Convention were mirrored in the Refugee Act in which Congress declared its purpose was to enforce the "historic policy of the United States to respond to the urgent needs of the persons subject to persecution in their homelands," Refugee Act § 101(a), and to provide "statutory meaning to our national commitment to human rights and humanitarian concerns." S. Rep. No. 256, at 1 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141.

The exclusion clauses contained in Article 1F were intended to deny the protections of the Convention to certain categories of individuals "who were deemed unworthy" of international assistance. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶ 147 (1979, reedited 1992) ("*Handbook*").[5] The denial of those "fundamental protections of a treaty whose purpose is the protection of human rights is a drastic exception to the purposes of the Convention . . . and can only be justified where the protection of those rights is furthered by the exclusion." *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 160 D.L.R.4th 193, 233-34 (Bastarache, J.) (Can.). In view of the humanitarian purposes underlying the Convention and "the serious consequences of exclusion for the person concerned . . . the interpretation of these exclusion clauses must be restrictive." *Handbook* ¶ 149.

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[5] The *Handbook* was prepared at the request of the Executive Committee of the High Commissioner's Programme, a body now comprised of representatives from 53 nations, including the United States, to provide guidance in applying the terms of the Convention. The criteria in the *Handbook* are based on UNHCR's experience, the practice of States in determining refugee status and the literature that has been devoted to the subject over a period of nearly 50 years. Acknowledging the expertise of the UNHCR in matters involving interpretation of the Convention and Protocol, this Court has stated that "the *Handbook* provides significant guidance in construing the Protocol, to which Congress sought to conform" and "in giving content to the obligations that the Protocol establishes." *Cardoza-Fonseca*, 480 U.S. at 439 n.22.

II. THE OBJECT AND PURPOSE OF ARTICLE 1F(b) IS TO DISTINGUISH *BONA FIDE* REFUGEES FROM SERIOUS COMMON CRIMINALS.

The vulnerable individuals whose fundamental rights the Convention was intended to protect are identified in Article 1A(2), which defines the term "refugee" as any person who is unwilling or unable to return to his country of origin "owing to well-founded fear of being persecuted for reasons of race, religion nationality, membership of a particular social group or political opinion." Consistent with the protective principles that underlie the Convention, the purpose of the exclusionary clauses was to draw a distinction between persons regarded as *bona fide* refugees deserving of international protection and persons who were deemed unworthy of such protection by virtue of their having committed one of the acts enumerated in those clauses. *See Pushpanathan*, 160 D.L.R.4th at 225 ("general purpose" of Article 1F is "to exclude . . . those who are not *bona fide* refugees").

Cognizant of the extreme consequences of exclusion, the Convention limited those clauses only to individuals who had committed acts of a heinous nature. Thus, Article 1F(a) applies to individuals who have committed "crimes against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes." The international instrument that was foremost in the minds of the drafters at the time the Convention was being debated was the Charter of the International Military Tribunal, 82 U.N.T.S. 279 (1945),[6] which defines crimes against peace as consisting principally of the "preparation, initiation or waging of war of aggression," and war crimes and crimes against humanity as including such barbarous acts as murder, extermination and enslavement of civilian populations and "wanton destruction of cities, towns or villages." *Id.* art. 6. Similarly, Article 1F(c) applies only to serious acts "of a criminal nature" that are

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[6] *See, e.g.*, Guy S. Goodwin-Gill, *The Refugee in International Law* 96 (2d ed. 1996); Atle Grahl-Madsen, 1 *The Status of Refugees in International Law* 276 (1966); Nehemiah Robinson, *Convention Relating to the Status of Refugees* 66-67 (1953).

"contrary to the purposes and principle of the United Nations," *Handbook* ¶ 162, and is directed principally, if not exclusively, to persons in positions of authority. *Id.* ¶ 163.[7]

Viewed in the context of the gravity of crimes covered under its sister provisions, it is apparent that Article 1F(b) was likewise intended to exclude from the definition of refugee persons who had committed acts so grave and unconscionable as to render them undeserving of international protection. *See Beecham v. United States*, 511 U.S. 368, 371 (1994).

That the serious non-political crime exception was intended to draw a distinction between refugees who are deserving of international protection and serious criminals who are not is apparent from the negotiating history of the Convention.[8] In the draft that was originally submitted to the Conference of Plenipotentiaries, the article which was to become Article 1F(b) denied the benefits of the Convention:

> to any person with respect to whom there are serious reasons for considering that (a) he has committed a crime specified in article VI of the London Charter of the International Military Tribunal; or (b) he falls under the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.

Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, U.N. Doc. A/CONF.2/1 at 5 (Mar. 12, 1951).

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7 The negotiating history provides an indication of the gravity of the acts Article 1F(c) was meant to encompass. *See, e.g.*, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of Meetings, U.N. Doc. A/CONF.2/SR.24 at 5 (July 17, 1951) (remarks of Mr. Hoare of the United Kingdom) ("such acts as war crimes, genocide and the subversion or overthrow of democratic regimes"). *See also* Grahl-Madsen, *supra* note 6, at 286 (violations of basic human rights).

8 Recourse to "extrinsic material is often helpful in understanding the . . . *purposes*" of a treaty, "thus providing an enlightened framework for reviewing its terms." *Xerox Corp. v. United States*, 41 F.3d 647, 652 (Fed. Cir. 1994) (emphasis added). Moreover, this Court "look[s] beyond the written words to the history of the treaty" when the terms in the text make interpretation "difficult or ambiguous." *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991); *accord Air France v. Saks*, 470 U.S. 392, 400 (1985); Vienna Convention, art. 32, 1155 U.N.T.S. 331.

Under Article 14(2) of the Universal Declaration of Human Rights, the right to seek and enjoy asylum from persecution could "not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations." U.N. Doc. A/RES/217(A)(III) (1948). As its language makes clear, Article 14(2) was principally directed at fugitives from justice whose primary reason for seeking refuge was to escape punishment for a crime, rather than to avoid persecution. Accordingly, in its original form, Article 1F(b) would only have barred those applicants whose "case" could be characterized as one of genuine "prosecution" for a non-political crime, as opposed to one of persecution on account of a Convention reason.

Consistent with the original language of Article 1F(b), the French representative to the negotiating conference repeatedly expressed his understanding that the purpose of the crime exclusion was to create a "means of sorting out" serious criminals on the one hand and "*bona fide* refugees" on the other.[9] Unwilling to allow the Convention to be exploited by fugitives from justice and hardened criminals who might be able to make out a claim of persecution, the French representative considered such a sorting out imperative in order to bring "the Convention into accordance with the requirements of international morality." Ad Hoc Committee on Statelessness and Related Problems, Summary Record of Meetings, U.N. Doc. E/AC.32/SR.33 at 8 (Sept. 20, 1950) (remarks of Mr. Rochefort).

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9 U.N. Doc. A/CONF.2/SR.24 at 10 (remarks of Mr. Rochefort). *See also id.* at 5. The French view was shared by others who noted that Article 14(2) "was clearly related to the issue of extradition," U.N. Doc. A/CONF.2/SR.29 at 16-17 (July 19, 1951) (remarks of Mr. Petrén of Sweden), and "was intended to apply to persons who were fugitives from prosecution in another country for non-political crimes," *id.* at 14 (remarks of Mr. Hoare). *See also* U.N. Doc. A/CONF.2/SR.24 at 6 (remarks of Mr. Trützschler of the Federal Republic of Germany); *Pushpanathan*, 160 D.L.R.4th at 233; Grahl-Madsen, *supra* note 6, at 291-92 (expressing view that purpose of Article 1F(b) was "to prevent the Convention from being exploited by persons who are fugitives from justice rather than genuine political refugees").

The views of the French delegation are important because it was at France's insistence that a proposed British amendment to eliminate the exclusion for common law crimes was rejected. U.N. Doc. A/CONF.2/SR.24 at 4-5 (July 17, 1951) (remarks of Mr. Hoare) (expressing view that it was "quite arbitrary and unjustifiable to place such persons beyond the scope of the Convention").[10] As a result of France's admonition that it would not be able to ratify the Convention if the British amendment were adopted, U.N. Doc. A/CONF.2/SR.24 at 13 (remarks of Mr. Rochefort), the British delegation accepted a French-backed compromise, U.N. Doc. A/CONF.2/SR.29 at 20 (July 19, 1951), under which the language referring to the Universal Declaration was replaced with the "serious crime" language that was ultimately incorporated into the final draft. While this compromise eliminated the requirement that a prosecution be pending in order to exclude an applicant suspected of criminal conduct, its principal purpose was to address the concerns of the United Kingdom and other States that persons who committed "minor offenses" not be excluded from the benefits accorded to refugees under the Convention.[11] In view of its roots in Article 14(2) of the Universal Declaration and the intention that it apply to a more serious category of criminal than that covered under Article 14(2), Article 1F(b) is properly construed as applying only where a State concludes that, by virtue of the seriousness of the alleged crime, the *case* of an applicant is, in reality, one of prosecution rather than persecution or that his criminal character predominates over his character as a *bona fide* refugee. *See Handbook* ¶ 156.

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10 The British amendment enjoyed significant support. *See, e.g.*, U.N. Doc. A/CONF.2/SR.29 at 12 (remarks of Baron van Boetzelaer of the Netherlands); *id.* at 14 (remarks of Mr. Herment of Belgium); *id.* at 17 (remarks of Mr. Petrén of Sweden).

11 *See, e.g.*, U.N. Doc. A/CONF.2/SR.24 at 8 (remarks of Mr. Hoare); U.N. Doc. A/CONF.2/SR.29 at 14 (remarks of remarks of Baron van Boetzelaer).

III. ARTICLE 1F(b) REQUIRES THAT CONSIDERATION BE GIVEN TO THE TOTALITY OF THE CIRCUMSTANCES IN ASCERTAINING WHETHER A CRIME IS SERIOUS.

UNHCR considers that the correct approach to ascertaining whether the offense of which an applicant is suspected constitutes a "serious non-political crime" within the meaning of Article 1F(b) is set forth in the *Handbook*. In order to make the distinction between serious common criminals and refugees that lies at the heart of Article 1F(b), it is essential that the totality of the circumstances surrounding the applicant's case be considered. At the outset, therefore, the crime for which the applicant has been or may be prosecuted and the sentence that has been or might be imposed must be identified. Next, "all the relevant factors—including any mitigating [or aggravating] circumstances must be taken into account." *Id.* ¶ 157. Finally, it is "necessary to strike a balance between the nature of the offense presumed . . . and the degree of persecution feared. If a person has a well-founded fear of very severe persecution, *e.g.* persecution endangering his life or freedom, a crime must be very grave in order to exclude him." *Id.* ¶ 156. As the Ninth Circuit ruled that this is the standard that should be applied in determining excludability under Article 1F(b) (Pet. at 6a-7a), its decision correctly construed U.S. obligations under the Protocol and should, therefore, be affirmed by this Court.[12]

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12 Congress, in the INA, has defined numerous crimes to be "aggravated felonies," 8 U.S.C. § 1101(a) (43) (1998), and, since 1990, has deemed all such felonies to be "particularly serious crimes" for purposes of § 1253(h)(2)(B), which bars applicants from withholding of deportation when they are convicted of such crimes in the United States. Immigration Act of 1990, Pub. L. No. 101-649, § 515(a), 104 Stat. 4978, 5053 (1990). It has been UNHCR's consistent position that this automatic bar to relief is inconsistent with a proper construction of the parallel exception contained in Article 33(2) of the Convention. *See Garcia v. INS*, 7 F.3d 1320, 1324 (7th Cir. 1993) (quoting position of UNHCR). Indeed, cognizant of this difficulty, Congress added a provision to the INA that gave the Attorney General discretion to grant an applicant relief if she deemed it "necessary to ensure compliance with the 1967 Protocol," notwithstanding the fact that such applicant may have been convicted of an "aggravated felony." Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No.

A. The Determination Of Seriousness Under Article 1F(b) Requires Consideration Of The Nature And Circumstances Of The Alleged Crime And The Character Of The Accused.

It is axiomatic that the determination of whether a crime is serious enough to raise the possibility of exclusion under Article 1F(b) must begin with an understanding of the nature of the crime at issue and the punishment that has been or may be imposed. Accordingly, an adjudicator must in the first instance identify the crime or crimes that the applicant is suspected of having committed under the law of the country in which the crime occurred. In a case in which an applicant has been convicted of a crime and criminal records are available, such an identification is no more than a ministerial function. Where, however, the only evidence of a crime being committed is the applicant's own testimony, identification of the crime, including all of the elements thereof, and the punishment that might be imposed, can be a much more difficult task.[13] It is, however, essential to any evaluation of whether the crime in question can be deemed a "serious non-political crime outside the country of refuge."[14]

104-132, § 413(f), 110 Stat. 1214, 1269 (1996). Pet Br. at 3a-4a. When Congress subsequently enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, § 307, 110 Stat. 3009-546, 612-14 (1996) several moths later, however, it repealed this provision. Pet. Br. at 5a-6a.

The fact that Congress has broadened § 1253(h)(2)(B)'s bar for crimes committed in the United States in a manner inconsistent with Article 33(2) does not, *ipso facto*, support an inference that Congress intended to broaden § 1253(h)(2)(C)'s bar for suspected criminal conduct abroad in a manner inconsistent with Article 1F(b). Indeed, the fact that Congress has not enacted a parallel amendment deeming aggravated felonies to be "serious crimes" for purposes of § 1253(h)(2)(C) supports the opposite inference, particularly in view of the Refugee Act's purpose of conforming its exclusionary provisions to the requirements of the Protocol.

13 *See, e.g., Matter of Ballester-Garcia*, 17 I.&N. Dec. 592, 594 (BIA 1980) (noting that it is the duty of "the immigration judge, and later [of] this Board, to decipher exactly what crime was involved in a given case").

14 Even where an applicant has been sentenced, the BIA has recognized the importance of identifying the crime for purposes of "shed[ing] light on an

The determination of seriousness also requires an evaluation of the circumstances surrounding the commission of that crime. Among the factors that should be considered in making such an evaluation are: (1) the intent and motive of the accused; (2) the degree of the accused's participation; (3) whether the crime was against persons or property;[15] (4) the seriousness of any injury caused in the case of crimes against persons; (5) the value of things taken or destroyed in the case of crimes against property; (6) the age of the accused; (7) the punishment that might have been imposed had a comparable crime been committed in the country of refuge; and, (8) any other aggravating or mitigating circumstances that might be relevant in ascertaining an appropriate punishment. *See, e.g., Matter of Ballester-Garcia*, 17 I.&N. Dec. 592, 595 (BIA 1980); Guy S. Goodwin-Gill, *The Refugee in International Law* 107 (2d ed. 1996); *Handbook* ¶ 157.

The nature of certain crimes such as murder, rape, child molestation and armed robbery is such as to raise a presumption of seriousness prior to any weighing of these factors. A much more careful examination of them is required, however, in the case of crimes such as assault, narcotics offenses, theft and malicious destruction of property where the range of penalties may vary greatly depending on the circumstances of the case. As set forth in the BIA's decision in *Ballester-Garcia*, at the time the Refugee Act was enacted, U.S. practice was consistent with this approach:

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alien's crime, or on how the . . . government views given crimes, i.e., whether the regime in general treats the same crimes in the same way vis-à-vis sentencing, and whether the sentences meted out reflect the government's views on the seriousness of the crimes." *Ballester-Garcia*, 17 I.&N. Dec. at 595. While such information is useful in all cases, it is of vital importance where, as here, no punishment has been imposed and, hence, no yardstick exists with which to measure how seriously the crime would be viewed by the government whose laws may have been violated. The Board's decision, however, does not identify the crime or crimes that may have been committed or what sentences may have been imposed under Guatemalan law.

15 *See Matter of Frentescu*, 18 I.&N. Dec. 244, 247 (BIA 1982) (noting that crimes against persons are more likely to be categorized as serious than crimes against property).

> Where a crime such as murder or armed robbery is at issue, we are unlikely to have much trouble in making this determination [of seriousness]. Where the crime is not obviously heinous, perhaps involving an offense against property only, determining the seriousness of the crime becomes a difficult task. In these situations, such factors as the alien's description of the crime, the turpitudinous nature of the crime according to our precedents, the value of the property involved, the length of sentence imposed and served, and the usual punishments imposed for comparable offenses in the United States, are all proper considerations in attempting to decide whether or not a crime may have been serious.

17 I.&N. Dec. at 595. *See also Matter of Frentescu*, 18 I.&N. Dec. 244, 247 (BIA 1982) (ruling that similar factors must be analyzed "in most proceedings" involving a "particularly serious crime" determination under § 1253(h)(2)(B)).[16]

In evaluating these factors, the overriding objective should be to determine whether the crime is so serious as to justify the possibility of *refoulement* of an alleged perpetrator to a country in which he has a well-founded fear of persecution. In view of the humanitarian purposes of the Convention and the extreme

16 Under a joint UNHCR/State Department status determination exercise involving Cuban applicants who had arrived in the United States during the Mariel exodus in 1980, crimes against property (such as burglary) and assault were only regarded as "serious crimes" when aggravating circumstances such as use of dangerous weapons, injury to persons, and property of significant value were involved. *See* Goodwin-Gill, *supra* note 6, at 107. Similarly, the BIA has found applicants to be excludable for such crimes only when significant aggravating circumstances have been present. *Compare Matter of Juarez*, 19 I.&N. Dec. 664, 665 (BIA 1988) ("[e]xcept possibly under unusual circumstances . . . we would not find a single conviction for a misdemeanor offense [of assault with a deadly weapon] to be a 'particularly serious crime'"), *with Matter of B*, 20 I.&N. Dec. 427, 430 (BIA 1991) (holding aggravated battery to be "particularly serious crime" because it involved use of firearm, victim was hit with bullet, and applicant was sentenced to five years imprisonment). The Board's decision in this case does not indicate that it considered such factors as Respondent's motive, the degree of his participation in the alleged crimes, the value of property he was suspected of destroying, the extent of any personal injury he may have caused, and the punishment that may have been imposed upon him for comparable offenses if committed in the United States.

consequences of exclusion, a crime cannot bar an applicant from being recognized as a refugee unless it can be classified as "a capital crime or a very grave punishable act. Minor offenses punishable by moderate sentences are not grounds for exclusion under Article 1F(b)." *Handbook* ¶ 155; *see also Gil v. Canada (Minister of Employment and Immigration)* [1994] 119 D.L.R.4th 497, 517 (Fed. Ct.) (noting that for a crime to be serious under Article 1F(b) it must "carry with it a heavy penalty which at a minimum will entail a lengthy term of imprisonment and may well include death").

In order to make the distinction between serious common criminals and refugees required by Article 1F(b), it is essential to look not only at factors that are directly related to the crime, but also to circumstances that define the character of the individual suspected of its commission. Thus, the *Handbook* provides that "[t]he fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty" constitutes relevant mitigating circumstances that should be considered in ascertaining the applicability of the serious non-political crime exclusion. *Id.* ¶ 157.[17]

Even when an applicant's debt to society has been paid or forgiven and it can be established, therefore, that he is fleeing persecution rather than prosecution, his criminal character may nonetheless be shown to predominate over his character as a refugee. *See Handbook* ¶ 157. Thus, the *Handbook* states that "[i]t is also necessary to have regard to any aggravating circumstances" such as the "criminal record" of the applicant and evidence showing lack of rehabilitation or remorse. *Id.*

Notwithstanding Petitioner's present position, the United States has, in fact, looked beyond the nature of the crime in connection with excludability determinations under Article 1F(b).

17 Several leading commentators have argued that Article 1F(b) should rarely, if ever, be applied where an applicant has served his sentence or been pardoned. *See, e.g.*, Grahl-Madsen, *supra* note 6, at 291-92; James C. Hathaway, *The Law of Refugee Status* 222 (1991); Paul Weis, *The Concept of Refugee in International Law*, 87 J. du Droit International 928, 984-86 (1960).

For instance, in resolving the cases of suspected criminals who arrived from Cuba during the Mariel exodus in 1980, the State Department considered contextual factors—such as evidence of habitual criminal conduct and whether five years or more had elapsed since completion of sentence—in determining excludability. *See* Goodwin-Gill, *supra* note 6, at 107. Similarly, in *Ballester-Garcia*, 17 I.&N. Dec. at 595, the Board stated that "the length of sentence imposed *and served*" is an appropriate consideration in evaluating whether a crime is serious under § 1253(h)(2)(C).[18]

B. The Determination Of Seriousness Under Article 1F(b) Requires Consideration Of The Likelihood And Severity Of The Persecution Feared.

The determination whether a person is a fugitive or serious criminal on the one hand or a *bona fide* refugee on the other necessarily entails giving careful consideration to the reasons that have led that person to seek refuge. Thus, in applying Article 1F(b), it is essential that "the gravity of the persecution of which the offender may have been in fear, and the extent to which such fear is well-founded be duly considered." *Handbook* ¶ 161. An applicant is excludable only when a determination has been made based on a balancing of these factors that the crime of which he is suspected is so serious as to support the conclusion either that he is "in reality a fugitive from justice" or that "his criminal character" outweighs his "character as a *bona fide* refugee." *Id.* ¶ 156.

Rather than allowing any room for consideration of the totality of circumstances surrounding an applicant's claim, including the reasons why he is seeking refuge, the Board employed an approach to Article 1F(b) that would limit the inquiry to a sterile examination of the nature of the crime alone and require the determination of seriousness to be made in a vacuum. Because, as Petitioner correctly observes (at 28-29), Article 1F creates an

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[18] Since most countries take into account both aggravating and mitigating factors, such as past criminal behavior in making sentencing decisions, consideration of the amount of the sentence imposed necessarily involves factors that are unrelated to the crime for which an applicant has been convicted.

absolute bar on persons who are determined to be excludable, the consequences of such a construction would be to deny individual States the right to recognize the status of persons they believe to be refugees deserving of international protection, rather than serious criminals or fugitives from justice. Such a result is inconsistent with the overriding humanitarian purposes of the Convention and the intent of the drafters.[19]

1. Construction of Article 1F(b) in a manner that precludes consideration of the totality of circumstances could yield grossly inhumane results.

A construction of Article 1F(b) in which the excludability determination turns upon whether a crime meets some abstract minimum threshold of seriousness without regard to context could lead to grossly inhumane results. Such a construction would require any State that has ratified the Convention to deny refugee status in any case in which there were serious reasons to consider that a person had committed a crime that reached this threshold, regardless of the likelihood and severity of the persecution feared, of how many years past the act had been committed, and of whether the suspect had served his sentence or been pardoned. The consequences of precluding consideration of such factors could be severe. For instance, applying Petitioner's interpretation of Article 1F(b), the following individuals could be barred from

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[19] The Board's decision is consistent with its *dicta* in *Matter of Rodriquez-Coto*, 19 I.&N. Dec. 208, 209-10 (BIA 1985), wherein it first rejected the *Handbook's* approach to Article 1F(b). *Rodriquez-Coto* does not reflect any effort to ascertain the meaning of that article by applying basic principles of treaty interpretation, despite the fact that Congress clearly intended that it do so. *See supra* Point I. Given the BIA's failure to "consider[ ] the proper factors" and the fact that they are "peculiarly within [the BIA's] expert knowledge" and "would be useful in determining the correct interpretation" of the Convention and Protocol, a remand in this case may be proper in order that these instruments can be interpreted by the BIA in the first instance using the approach mandated by Congress. *American Postal Workers Union, AFL-CIO v. U.S. Postal Service*, 707 F.2d 548, 561 (D.C. Cir. 1983); *see also Abbot Labs. v. Young*, 920 F.2d 984, 990 (D.C. Cir. 1990) (holding that appellate court has "no authority to place a construction" on an ambiguous statute that "the agency has not offered," and remanding to agency for that purpose).

receiving international protection and placed back in the hands of their persecutors because of crimes considered to be "particularly serious" under U.S. law:

- a school teacher who, after having been forced into slave labor and brutally tortured by the Khmer Rhouge, fled Kampuchea in a stolen boat, a crime for which he was sentenced, *in absentia*, to a prison term of five years (8 U.S.C. § 1101(a)(43)(G)(1998));
- a Tutsi who had sought refuge at the time that genocide was being perpetrated against the Tutsi population in Rwanda, but who had been arrested on charges of tax evasion, (8 U.S.C. § 1101(a)(43)(M)(ii)), regardless of the fact that the alleged crime had been committed ten years before, he had been amnestied and he had no other criminal record;
- a Jew who applied for asylum in 1943 after escaping certain death in Auschwitz, but who thirty years earlier at the age of 18 had been convicted of an act of vandalism, (8 U.S.C. § 1101(a)(43)(F)), despite the fact that he had served his sentence and has been completely rehabilitated since his release.

Having adopted the Convention in the aftermath of, and largely as a response to, the extermination of European Jewry by Hitler's Germany, it is simply inconceivable that the drafters intended the serious non-political crime exclusion to be applied in such a harsh and mechanical manner. To the contrary, during the debate on the Convention, delegate after delegate expressed the view that even in exceptional circumstances it would be intolerable to return an "intractable refugee" to his country of origin in a situation where "certain death" awaited him.[20] In order to avoid

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[20] Ad Hoc Committee on Statelessness and Related Problems, U.N. Doc. E/AC.32/SR.20 at 15 (Feb. 1, 1950) (remarks of the Chairman). *See, e.g.*, U.N. Doc. E/AC.32/SR.40 at 31 (Aug. 22, 1950) (remarks of Mr. Henkin of the United States) (noting that "it would be highly undesirable to suggest . . . that there might be cases, even highly exceptional cases, where a man might be sent to death or persecution"); *id.* at 32 (remarks of Mr. Robinson of Israel) ("Governments . . . were not to send [intractable refugees] back to the country

such a result, it was understood that Article 1F(b) would involve a balancing between the nature of the crime committed and the degree of persecution feared. The remarks of the President concerning the approach to be followed in applying that article were summarized as follows:

> When a person with a criminal record sought asylum as a refugee, it was for the country of refuge to strike a balance between the offenses committed by that person and the extent to which his fear of persecution was well founded. He would simply ask representatives to keep in mind the hypothetical case of some minor official of an outlawed political party who had a criminal record. He was convinced that all countries, both in Europe and overseas, had, even under the earlier Conventions, always dealt with such cases fairly.[21]

Similarly, the British delegate stated that a person who was convicted of a crime in the country of refuge would be subject to *refoulement* "if the persecution to which he would be subjected in his country of origin was not very serious," but that "the power to expel him would not of course be employed if it would endanger his life." U.N. Doc. E/AC.32/SR.40 at 31 (Aug. 22, 1950) (remarks of Mr. Brass).

Based on their own exhaustive studies and for many of the reasons set forth herein, the most highly qualified publicists on the subject are virtually unanimous in their support for the position that an individual may not be excluded under Article 1F(b) where the risk and gravity of the persecution feared outweighs the significance of his criminal conduct.[22]

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where death awaited him."); *id.* at 31 (remarks of Mr. Brass of the United Kingdom).

[21] U.N. Doc. A/CONF.2/SR.29 at 23; *see* U.N. Doc. A/CONF.2/SR.24 at 13 (remarks of the President, speaking as representative of Denmark).

[22] *See, e.g.*, Goodwin-Gill, *supra* note 6, at 106-07; Grahl-Madsen, *supra* note 6, at 298; Hathaway, *supra* note 17, at 224-25; Weis, *supra* note 17, at 986.

2. Consideration of the totality of the circumstances is consistent with UNHCR and State practice.

Since the Convention entered into force in 1954, UNHCR has been called upon to conduct countless thousands of status determination interviews in order to ascertain whether an individual is entitled to international protection as a refugee in countries that are not parties to the Convention or Protocol. In countries that are parties to those instruments, UNHCR has provided guidance and recommendations aimed at ensuring that their provisions are interpreted and applied in a uniform manner and a humanitarian spirit. In fulfilling both its adjudicative and its advisory role, UNHCR has consistently followed the criteria set forth in the *Handbook*, including with respect to the Article 1F(b) requirement that a balance be struck "between the nature of the offence . . . and the degree of persecution feared." *Id.* ¶ 156.

The provisions of the *Handbook*, including the balancing requirement, were based upon State practice, exchanges of views with the competent authorities of contracting States and UNHCR's own extensive experience during a period of about 25 years preceding the *Handbook's* initial publication in 1979. *Id.* at 1. UNHCR respectfully submits that the comprehensive and fundamentally humanitarian approach set forth in the *Handbook* for evaluating whether criminal conduct is excludable under Article 1F(b) broadly reflects the common understanding of States regarding the application of that provision over a span of more than four decades after the effective date of the Convention. That understanding was recently affirmed by the 15 member States of the European Union who have issued an official statement setting forth their opinion that in applying Article 1F(b), "[t]he severity of the expected persecution is to be weighed against the nature of the criminal offense." Council of the European Union's Joint Position on the Harmonized Application of the Definition of the Term 'Refugee,' E.U. Doc. No. 96/196/JHA ¶ 13 (1996).[23]

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[23] Article 31 of the Vienna Convention provides that in construing a treaty "there shall be taken into account . . . (b) any subsequent practice in the application of the treaty." 1155 U.N.T.S. 331. Similarly, this Court has ruled that the practice of signatories to a treaty "cannot be ignored" when construing its meaning. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 260 (1984); *accord Stuart*, 489 U.S. at 369. It is true that in the past several years, a small number of national tribunals that have considered the issue have reached conflicting decisions with respect to the proper interpretation and application of Article 1F(b). *Compare Pham*, SR 196.615 (Apr. 16, 1993) (decision of French Commission des Recours des Refugies (C.R.R.) adopting balancing test) *with T v. Secretary of State for the Home Dep't*, 2 All E.R. 865, 882 (H.L. 1996) (Lord Mustill (rejecting balancing test) and *Malouf v. Canada (Minister of Citizenship and Immigration)* [1995] 190 N.R. 230 (Fed. Ct. App.) (same). *Cf. Chahal v. United Kingdom*, 23 E.H.R.R. 413 (Eur. Ct. H.R. 1996) (exception in Article 33(2) to the principle of *non-refoulement* based on danger to national security requires balancing that danger against the degree of persecution feared). The decisions rejecting the approach set forth in the *Handbook* should, however, be evaluated in the light of the "reasonably harmonious practice" employed throughout the world during "the first 40 years of the Convention's existence." *Trans World Airlines*, 466 U.S. at 259.

Notwithstanding Petitioner's present position that it is impermissible to look beyond the nature of the crime itself in making the determination of seriousness, past U.S. practice has been consistent with the balancing approach. Prior to the enactment of § 421 of AEDPA in April 1996, which made individuals who had committed serious non-political crimes ineligible for asylum (Pet. at 8a), immigration judges were required under the Refugee Act to consider the totality of the circumstances, including the likelihood and severity of threatened persecution, in making the determination whether an applicant is entitled to asylum. Indeed, in *Matter of Gonzalez*, 19 I.&N. Dec. 682, 685 (BIA 1988), the BIA ruled that:

> The nature and gravity of [a] conviction [barring relief under section 243(h)] may militate heavily against an applicant for asylum, and in some cases may ultimately be the determinative factor, but it is not the only evidence that should be received and considered by an immigration judge or this Board in evaluating whether an otherwise eligible applicant warrants a grant to asylum as a matter of discretion.[24]

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[24] *See also Joseph v. INS*, 909 F.2d 605, 608 (9th Cir. 1990); *Arauz v. Rivkind*, 845 F.2d 271, 276 (11th Cir. 1988); *Shahandeh-Pey v. INS*, 831 F.2d 1384, 1387 (7th Cir. 1987) (holding that "it is imperative that all aspects" of an asylum application "be fully considered and that the Board's decision reflect this deliberation"); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 518 (9th Cir. 1985)

Consistent with the BIA's decision in *Gonzalez*, the INS' internal operating manual instructed asylum officers that:

> Under the regulations, serious non-political crimes are not an absolute bar to a grant of asylum. See 8 C.F.R. § 208.14(d). Rather, an alien's complicity in a serious non-political crime committed abroad is a factor for the asylum officer to consider in the exercise of discretion.

INS, *Basic Law Manual* 68 (1991 & Supp. 1995) (*"Basic Law Manual"*). Among the discretionary factors that must be considered in deciding whether an applicant is entitled to asylum, the likelihood and severity of the persecution feared has been properly regarded as "the most compelling equity." *Shahandeh-Pey*, 831 F.2d at 1387; *accord Hernandez-Ortiz v. INS*, 777 F.2d at 518.[25]

In the case of an applicant suspected of having committed a serious non-political crime, the INS recognized that such balancing of all relevant factors was *required* under the Convention. As it noted in commenting on its proposed rule setting forth the guidance to be followed by immigration judges in resolving claims under the Refugee Act:

> In the asylum context, evidence of the commission of such non-political crimes will now be a discretionary factor to be considered together with the totality of circumstances and equities on a case-by-case basis *consistent with the proper intent of* the Refugee Act of 1980 as well as *the 1951 U.N. Convention and 1967 Protocol Relating to the Status of Refugees*.

(holding that the Board "must specify clearly the factors it has considered" when denying an asylum application).

25 Section 421(b) of the AEDPA applies only to "asylum determinations made on or after" its effective date. Pet. at 8a. Yet, despite the fact that the agency's determination in this case occurred on March 5, 1996—50 days *prior* to the effective date of § 421(b)—that decision does not reflect consideration of such favorable discretionary factors and instead declines "to address the respondent's statutory eligibility for asylum" in view of "the nature of his acts." Pet. at 17a-18a.

53 Fed. Reg. 11300, 11301 (Apr. 6, 1988) (emphasis added). The import-of Petitioner's present position is that, rather than being consistent with the Convention and Protocol, the former U.S. practice of considering the totality of circumstances, including the degree of persecution feared, violated those instruments whenever such consideration resulted in the granting of refugee status to a person who committed a non-political crime that is now deemed to be "serious" under U.S. law.[26]

Finally, it is worth noting that the balancing approach that is set forth in the *Handbook* in connection with determining excludability under Article 1F(b) is also part and parcel of the widely accepted distinction between persecution and prosecution with respect to determinations of refugee status under Article 1A. As the *Handbook* explains, "a person guilty of a common law offense may be liable to excessive punishment, which may amount to persecution." *Id.* ¶ 57; *see also id.* ¶ 85. Consistent with the *Handbook*, the BIA has acknowledged that "[e]vidence that punishment for a politically related act would be disproportionate to the crime would indicate persecution on grounds of political opinion rather than prosecution." *In re S.P.*, Int. Dec. 3287 (BIA 1996); *accord Chanco v. INS*, 82 F.3d 298, 302 (9th Cir. 1996). Under Petitioner's present view, however, the distinction between persecution and prosecution would be inapplicable whenever there were serious reasons to consider that an applicant had committed a crime that might be viewed as "serious" in the abstract. Thus, a dissident from a totalitarian State who had received a sentence of death for having bribed a local official (8 U.S.C. § 1101(a)(43)(R) (1998)), might be barred from receiving international protection under Article 1F(b), despite the fact that such penalty was imposed with a persecutory intent and was grossly disproportionate to the

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26 As set forth in Point III.A. *supra*, even outside of the context of asylum, U.S. practice has been to consider factors such as an applicant's criminal record and whether he has served his sentence in determining excludability under Article 1F(b). Inasmuch as such factors bear no more relation to the nature of a crime than does the degree of persecution feared, there is no principled basis for a construction of Article 1F(b) that would permit consideration of those factors, but preclude consideration of the latter.

three-year sentence normally imposed for such crimes under that State's law.

IV. ARTICLE 1F(b) IS APPLICABLE WHEN AN OFFENSE IS NOT CLOSELY RELATED TO A POLITICAL OBJECTIVE, IS DISPROPORTIONATE TO THAT OBJECTIVE OR IS ATROCIOUS IN NATURE.

The Convention offers no explicit guidance for determining what is meant by the term "non-political crime." The concept of a "political offense" is, however, a familiar one in extradition law[27] and it is clear that "the framers of the Convention had extradition law in mind" in choosing the term "non-political" in Article 1F(b) "and intended to make use of the same concept." *T v. Secretary of State for the Home Dep't*, 2 All E.R. 865 (H.L. 1996); *see also supra* note 9 and accompanying text.

Construing the "non-political crime" language in a manner that takes into account State practice in the area of extradition and the humanitarian purposes underlying the Convention, the *Handbook* sets forth the following approach for "determining whether an offence is 'non-political' or is . . . a 'political' crime" within the meaning of Article 1F(b):

> [R]egard should be given in the first place to [the] nature and purpose [of the offense] i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective.

Id. ¶ 152. The INS has adopted essentially the same test as that set forth in the *Handbook* for determining whether a crime is political under § 1253(h)(3)(C) of the Refugee Act. As set forth in its *Basic Law Manual*, in order to qualify as "political," a crime must be

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27 *See United States v. Kin-Hong*, 110 F.3d 103, 113 (1st Cir. 1997) ("the political offense exception is now a standard clause in almost all extradition treaties").

committed out of "'genuine political motives'" and must have a "'direct, causal link'" with its "'alleged political purposes and object.'" *Id.* at 68 (quoting *McMullen v. INS*, 788 F.2d 591, 595 (9th Cir. 1986)) In addition:

> [e]ven if the preceding standards are met, a crime should not be considered a serious non-political crime if the act is disproportionate to the objective, or if it is of an atrocious and barbarous nature.

Basic Law Manual at 68 (citing *McMullen*, 788 F.2d at 595).

UNHCR's clear position is that acts can never qualify as "political" within the meaning of Article 1F(b) when they are atrocious in nature. In every conceivable instance, the use of indiscriminate killing, summary execution, torture and other such atrocities to achieve political ends will surpass the absolute outer limits of reasonable proportionality. Thus, UNHCR would not under any circumstances regard a person who has committed acts of such a barbarous nature as deserving of international protection, regardless of his political objectives.

Within the broader spectrum of politically motivated acts that are not atrocious in nature, Article 1F(b) requires a careful analysis of whether those acts are closely linked with and reasonably proportionate to their political objectives. As set forth below, the determination of whether an act involving use of force can be regarded as a "political crime" can involve difficult questions the resolution of which requires consideration of the context and all of the circumstances surrounding such use.

A. The Convention Requires Consideration Of The Relationship Between The Offense And Its Objective In Determining Whether It Is Political Within The Meaning Of Article 1F(b).

In order to be classified as political under Article 1F(b), a crime must be causally related to the achievement of a genuine political objective that is consistent with the principle of respect for human rights and fundamental freedoms. *Handbook* ¶ 152. In determining whether such a relationship exists, the focus must be on "the circumstances surrounding the acts" at issue. *McMullen*, 788 F.2d at 597.

Of particular significance in evaluating the relationship between the offense and its purpose is the status of the person or property against which the act is principally directed. At one end of the spectrum, the political link is strongest for offenses primarily directed against government personnel and property. At the other end of the spectrum, the link is weakest when politically motivated acts are principally directed against private interests and is non-existent when those acts are intended to do nothing more than "promote social chaos." *McMullen*, 788 F.2d at 597. As the Ninth Circuit noted in *McMullen*, this distinction between "acts directed at the military or official agencies of the state, and random acts of violence against ordinary citizens . . . has been extant in the common law" since the British case of *In re Meunier*, 2 Q.B. 415 (1894). *Id.*; *see also Ornelas v. Ruiz*, 161 U.S. 502, 509-12 (1896); *Eain v. Wilkes*, 641 F.2d 504, 521 (7th Cir. 1981).

The fact that an offense is aimed at a government target is a factor that should weigh heavily in favor of a finding of a causal relationship between a politically-motivated crime and its objective—though that factor would not necessarily be sufficient to establish such a relationship. On the other hand, while the fact that civilians were harmed would weigh against finding such a link, it would be wrong to conclude that a crime can never be deemed political when it has an impact upon private persons or property.[28] It is clear, however, that when civilians are injured or killed as a result of barbarous acts, such as indiscriminate bombing and other acts of terrorism, the linkage between those acts and the political motivation of the perpetrator can never be sufficient. *McMullen*, 788 F.2d at 597; *accord Eain*, 641 F.2d at 521.

A distinction should be drawn between acts that are primarily directed against civilians, such as indiscriminate acts of violence

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[28] *See, e.g., In re Ezeta*, 62 Fed. 972, 1003 (N.D. Cal. 1894) (finding that military officer's seizure of funds from privately owned bank in order to pay armed forces who were seeking to defend government from armed rebellion was a political crime); *Regina v. Governor of Brixton Prison ex parte Kolczynski*, 1 Q.B. 540, 549 (1955) (finding that actions of Polish seamen who seized a fishing trawler and assaulted its master in order to escape political prosecution constituted a political crime).

that are intended to inflict pain and suffering upon them, and acts that are primarily directed against the government, but that have an incidental or accidental affect on civilians. In the latter case, an offense may be regarded as political—so long as it is not otherwise out of proportion to its political objective. *See Gil*, 119 D.L.R.4th at 516. Thus, for instance, the fact that a civilian may have been accidentally injured during the course of an armed rebellion would not disqualify the associated act from being considered a "political crime." *Id.* Similarly, the fact that a participant in a political uprising may have used physical force to get past a group of civilians who were blocking the path between him and government troops would not disqualify him from being regarded as a political offender, unless again the amount of force used was excessive or otherwise disproportionate to his political objectives.[29]

Even in cases in which the affect on private interests is not accidental or incidental, a crime might still be regarded as political if those private interests are directly and closely related in some significant way to a political objective. For instance, the act of American colonialists in dumping tea privately owned by the East India Company into Boston harbor shortly before the outbreak of the American Revolution might be regarded as "political" because of the close relationship to the government-imposed tax they were protesting and the property destroyed.

B. A Crime Is Non-Political Within The Meaning Of Article 1F(b) If It Is Disproportionate To Its Political Objectives.

Even if a crime is closely linked to a political objective, it may not be deemed "political" within the meaning of Article 1F(b) unless its political elements "outweigh its common-law character."

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[29] The Board's decision does not reflect whether it considered if the alleged injuries resulted from acts primarily directed against the government or against private persons or property. The Board also did not state whether it regarded the bus owners to be among the victims of the alleged crimes (*see* Pet. at 18a) or whether it regarded the buses as being publicly or privately owned. Given the emphasis the Board placed on the status of the victims in making its proportionality finding, it is, therefore, not clear whether the Board viewed the destruction of those buses to be a "non-political crime."

Handbook ¶ 152; *accord Matter of McMullen*, 19 I.&N. Dec. 90, 97-98 (BIA 1984). As the BIA has ruled, the political elements of an offense cannot predominate over its criminal character when that offense is "grossly out of proportion to the political objective" or is of "an atrocious nature." *McMullen*, 19 I.&N. Dec. 90, 98; *accord Handbook* ¶ 152.

Where atrocities akin to murder, torture, or maiming of innocent civilians are not involved, balancing the criminal character of an act against its political elements is required. Such balancing involves consideration of the totality of relevant circumstances, including at the outset, the nature of the offense, the amount of the damage and the status of the person or property affected. *See, e.g.*, *Handbook* ¶ 86; *McMullen*, 788 F.2d at 595-97. All relevant factors must then be evaluated in light of the extent to which lawful or less violent means of protest are available for achieving the political objective in question.[30] In determining whether the means used in furtherance of a political objective are proportionate, account must also be taken of the consistency of those means with the international instruments governing human rights and, where relevant, the laws of armed conflict.

Such a balancing is unavoidable since resort to force in pursuing a political objective does not *per se* render an individual excludable under Article 1F(b). While the use of force is to be taken into account, it must be borne in mind that political offenses may take place in the context of an armed conflict or insurrection[31] and that "[a]pplications for refugee status" are, therefore, "frequently made by persons who have used force" that is associated with their "political activities or political opinions." *Handbook* ¶ 175. As the *Handbook* makes clear (¶ 176), the applications of such individuals must "be examined from the standpoint of the inclusion clauses in the 1951 Convention," as

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30 *See, e.g.*, *Chanco*, 82 F.3d at 401; *Dwomoh v. Sava*, 696 F. Supp. 970, 978 (S.D.N.Y. 1988); *Matter of Izatula*, 20 I.&N. Dec. 149, 154 (BIA 1990); *Governor of Brixton Prison*, 1 Q.B. at 549.

31 Indeed, "historically," the political offense exception "embraced only offenses aimed either at accomplishing political violence or at repressing violent political opposition." *Koskotas v. Roche*, 931 F.2d 169, 172 (1st Cir. 1991).

well as from the standpoint of the exclusion clauses, to determine whether, in light of all of the circumstances, they have a "fear of persecution and not merely a fear of prosecution" and, hence, are deserving of international protection. *Id.* ¶ 86; *see* cases cited *supra* note 30. Accordingly, a finding that an offense involves the use of force is not by itself sufficient to support a conclusion that its political nature is outweighed by its criminal character.

Nor, as explained in Point IV.A, *supra*, would a finding that civilians were adversely affected by the offense, without more, be sufficient to support such a conclusion—though it would make a finding of proportionality less likely. On the other hand, if an offense constitutes a grave violation of human rights or of the law of armed conflict,[32] such an act could not be characterized as "political," regardless of the objectives being pursued or whether the victim of that offense was a civilian, a government official or a member of the military.[33] Thus, for instance, if rather than using the minimum amount of force necessary to clear civilians from a presidential palace that had been seized during a rebellion, armed insurgents were to shoot them in cold blood, such act would not be considered a political crime. Nor could the torture of a government soldier be regarded as a political offense even if carried out in order to obtain information vital to the rebellion. As the district court explained in *Matter of Doherty*, 599 F. Supp. 270, 274 (S.D.N.Y. 1984) "a proper construction" of the political offense exception:

> requires that no act be regarded as political where the nature of the act is such as to be violative of international law, and

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32 Of course, where there are "serious reasons for considering" that an applicant for refugee status has committed a "war crime," the individual must be excluded from the Convention's protections under Article 1F(a), without considering whether the offense was "non-political."

33 *See, e.g.*, *Matter of Marzook*, 924 F. Supp. 565, 577-78 (S.D.N.Y. 1996); *Matter of Ahmad*, 726 F. Supp. 389, 408 (E.D.N.Y. 1989) ("[o]ffenses that transcend the Law of Armed Conflict are beyond the limited scope of the political offenses"); *Matter of Doherty*, 599 F. Supp. 270, 274 (S.D.N.Y. 1984), *appeal dismissed*, 615 F. Supp. 755 (S.D.N.Y. 1985), *aff'd*, 786 F.2d 491 (2d Cir. 1986).

inconsistent with the international standards of civilized conduct. Surely an act which would be properly punishable even in the context of a declared war or in the heat of open military conflict cannot and should not receive recognition under the political [crime] exception.

Uses of force that are neither atrocious nor violative of international standards of conduct may, depending upon the circumstances, be deemed proportionate to political objectives. In view of the extreme consequences of exclusion for the person concerned and the humanitarian principles that underlie the Convention, a comprehensive approach to the issue of proportionality that takes into account all of the circumstances surrounding the offense and its objectives is necessary to ensure that *bona fide* refugees receive the international protection they deserve.[34]

CONCLUSION

For the foregoing reasons, UNHCR, as *amicus curiae*, respectfully urges that the decision of the Ninth Circuit be affirmed.

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[34] The Board's decision does not reflect whether, in making its proportionality determination, it considered such factors as: (1) the amount of damage caused, (2) the extent to which alternative means of protest were available for achieving those objectives, and (3) the extent to which those means were consistent or inconsistent with international standards of civilized conduct. The Board's decision does suggest that it viewed the fact that Respondent's acts "attract[ed] the attention" of the government as significant. Pet. at 18a. The relevance of that factor to the determination of whether an offense meets the proportionality test is unclear. Given that political offenses, by definition, have as their objective the alteration of the policies or structure of government, those offenses will almost invariably attract government attention.

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January 21, 1999